



1976

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## Recommended Citation

Ernest E. Figari Jr., *Texas Civil Procedure*, 30 Sw L.J. 293 (1976)  
<https://scholar.smu.edu/smulr/vol30/iss1/12>

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# TEXAS CIVIL PROCEDURE

by

Ernest E. Figari, Jr.\*

MAJOR developments in the field of civil procedure during the survey period include judicial decisions, statutory enactments,<sup>1</sup> and amendments to the Texas Rules of Civil Procedure.<sup>2</sup> This *Survey* will examine these developments and consider their impact on existing Texas procedure.

## I. JURISDICTION OVER THE PERSON

The most significant development in the area of jurisdiction over the person was the enactment of a marital long-arm statute.<sup>3</sup> The enactment was encouraged<sup>4</sup> by the recent decision of the Texas Supreme Court in *Mitchim v. Mitchim*,<sup>5</sup> which recognized the assertion of marital long-arm jurisdiction by another state. Service had previously been effected over a Texas resident by an Arizona court under its long-arm procedure and, after the Texas defendant failed to appear, a judgment had been obtained against him for alimony, attorney's fees, and costs. Later, suit was filed by the defendant in Texas seeking a declaration that the Arizona court had no jurisdiction to render a personal judgment against him. Reversing the holding of the lower courts that the Arizona judgment was void, the supreme court concluded that courts must recognize the assertion of marital long-arm jurisdiction by another state, provided the required minimum contacts existed between that state and the nonresident.<sup>6</sup>

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1. The enactments which have procedural implications principally concern jurisdiction of the person, TEX. FAM. CODE ANN. §§ 3.26, 11.051 (Supp. 1975-76); limitations, TEX. INS. CODE ANN. art. 5.82 (Supp. 1975-76); interest on judgments, TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Supp. 1975-76); sequestration, TEX. REV. CIV. STAT. ANN. art. 6840 (Supp. 1975-76); and appellate jurisdiction of the district court in probate matters, TEX. PROB. CODE ANN. § 5 (Supp. 1975-76).

2. As a result of the amendments, 36 Texas Rules of Civil Procedure were modified, 4 new rules were added, and 16 rules were repealed. These changes became effective January 1, 1976. See *Civil Procedure Rules Amended*, 38 TEX. B.J. 823 (1975).

3. TEX. FAM. CODE ANN. § 3.26 (Supp. 1975-76). Although of lesser significance, it should be noted that a parent-child long-arm statute was also enacted during the survey period. See *id.* § 11.051. Prior to the enactment of these long-arm statutes in the family law field, Texas long-arm statutes dealt only with service of process upon nonresidents and foreign corporations engaged in business within the state, TEX. REV. CIV. STAT. ANN. art. 2031b (1964), and upon nonresident drivers involved in litigation arising from their use of the state's streets and highways, *id.* § 2039a.

4. See Sampson, *Long-Arm Jurisdiction Marries the Texas Family Code*, 38 TEX. B.J. 1023, 1026 (1975).

5. 518 S.W.2d 362 (Tex. 1975).

6. *Id.* at 364-65. The supreme court also noted and discussed the trend among other states toward the enactment of marital long-arm statutes. *Id.* at 365. See, e.g., KAN. STAT. ANN. § 60-308 (Supp. 1974); NEB. REV. STAT. § 42-355 (1974), § 25-521 (1965); OKLA. STAT. ANN. tit. 12, § 1701.03(a)(7) (Supp. 1975); WIS. STAT. §§ 247.055, 247.057, 262.05 (Supp. 1975); *interpreted and discussed in* Scott v. Hall, 203 Kan. 331, 454 P.2d 449 (1969); Stucky v. Stucky, 186 Neb. 636, 185 N.W.2d 656 (1971); Hines v. Clendenning, 465 P.2d 460 (Okla. 1970); Dillon v. Dillon, 46 Wis. 2d 659, 176 N.W.2d 362 (1970).

Following the suggestion of *Mitchim*, section 3.26 of the Texas Family Code was amended. It provides that if the petitioner is a resident of Texas at the commencement of an action for divorce or annulment or a suit to declare a marriage void, the court may exercise personal jurisdiction over a nonresident respondent if "this state is the last state in which marital cohabitation between petitioner and the respondent occurred and the suit is commenced within two years after the date on which the cohabitation ended" or "there is any basis consistent with the constitution of this state or the United States for the exercise of the personal jurisdiction."<sup>7</sup>

The attorney representing a nonresident defendant who is served under article 2031b,<sup>8</sup> Texas' first long-arm statute, who finds himself short on time, can take comfort from *Omniplan, Inc. v. New America Development Corp.*<sup>9</sup> Rule 120a,<sup>10</sup> which originally established the conditions of a special appearance to challenge personal jurisdiction, required that such an appearance "be made by sworn motion filed prior to . . . any other plea, pleading or motion." In *Omniplan* the court concluded that an attorney's informal request of opposing counsel, made to secure an extension of time in which to file a pleading, and unaccompanied by the filing of a motion, did not constitute a general appearance resulting in a waiver of the nonresident defendant's right to challenge jurisdiction over his person.

*Omniplan* also delineates the requirements of a verification of a special appearance motion. Faced with a motion containing a jurat by defendant's counsel stating "that the allegations of fact contained therein are true and correct,"<sup>11</sup> the court concluded that rule 120a did not require that the verification affirmatively show on its face that it was made on personal knowledge. In this respect, the importance of the holding in *Omniplan* may have been diminished by the amendment of rule 120a. Significantly, when a special appearance motion is deficient in some respect, rule 120a now permits the motion to be amended to cure the defect.<sup>12</sup>

The new amendments to the Texas Rules of Civil Procedure, which be-

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7. TEX. FAM. CODE ANN. § 3.26 (Supp. 1975-76) provides in full that:

(a) If the petitioner is a resident or a domiciliary of this state at the commencement of a suit for divorce, annulment, or to declare a marriage void, the court may exercise personal jurisdiction over the respondent, or the respondent's personal representative, although the respondent is not a resident or a domiciliary of this state if:

(1) this state is the last state in which marital cohabitation between petitioner and the respondent occurred and the suit is commenced within two years after the date on which cohabitation ended; or

(2) notwithstanding Subdivision (1) above, there is any basis consistent with the constitution of this state or the United States for the exercise of the personal jurisdiction.

(b) A court acquiring jurisdiction under this section also acquires jurisdiction in a suit affecting the parent-child relation if Section 11.051 of this code is applicable.

See McKnight, *Family Law, Annual Survey of Texas Law*, 29 Sw. L.J. 67, 103 (1975).

8. TEX. REV. CIV. STAT. ANN. art. 2031b (1964).

9. 523 S.W.2d 301 (Tex. Civ. App.—Waco 1975, no writ).

10. TEX. R. CIV. P. 120a (1967).

11. 523 S.W.2d at 304.

12. TEX. R. CIV. P. 120a. As originally adopted, rule 120a contained no specific provision for amendment of the special appearance motion. TEX. R. CIV. P. 120a (1967).

came effective January 1, 1976, made several changes in the area of jurisdiction over the person. Before the amendments, where personal service on a resident defendant was not practical, rule 106<sup>13</sup> authorized the trial court to order substituted service. Such service could be made by leaving a copy of the citation, with petition attached, at the usual place of business of the defendant to be served, or by delivering it to any one over sixteen years of age at the defendant's usual place of abode.<sup>14</sup> Adding to the specified methods of service, rule 106<sup>15</sup> now provides that substituted service may also be effected "by registered or certified mail."

Prior to its recent amendment, rule 108<sup>16</sup> had been interpreted to provide for notice to a nonresident or absent defendant in an action involving property situated within Texas.<sup>17</sup> As thus interpreted, the rule dealt exclusively with notice to defendants in actions in which Texas courts had in rem jurisdiction. Intending to permit acquisition of personal jurisdiction to the constitutional limits, rule 108<sup>18</sup> was amended to authorize service on a nonresident or absent defendant "to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam." If amended rule 108 is held to enlarge the existing framework of Texas long-arm statutes, however, it could prove constitutionally defective.<sup>19</sup>

Whenever a citation by publication is authorized,<sup>20</sup> rule 109a,<sup>21</sup> which is completely new, permits the trial court, on motion, to "prescribe a different method of substituted service" if the court finds "that the method so prescribed would be as likely as publication to give defendant actual notice."

## II. VENUE

Aimed at eliminating distant forum abuses in consumer transactions,<sup>22</sup> subdivision 5 of article 1995<sup>23</sup> was amended in 1973 to provide that in an action upon a contract arising out of a "consumer transaction," suit by a creditor upon the contract may be brought against the defendant either in the county in which the defendant signed the contract or in the county in which the defendant resides at the time of the commencement of the action. Interpreting amended subdivision 5 for the first time are *Castleberry v. Acco Feeds*<sup>24</sup>

13. TEX. R. CIV. P. 106 (1967).

14. In both its present and earlier form TEX. R. CIV. P. 106 also generally allows the court to order substituted service "in any other manner which will be reasonably effective to give defendant notice of the suit."

15. TEX. R. CIV. P. 106.

16. TEX. R. CIV. P. 108 (1967).

17. See, e.g., *Roumel v. Drill Well Oil Co.*, 270 F.2d 550 (5th Cir. 1959); *Aamco Automatic Transmissions, Inc. v. Evans Advertising Agency, Inc.*, 450 S.W.2d 769 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).

18. TEX. R. CIV. P. 108.

19. See letter from Hans W. Baade to the *Texas Bar Journal*, 38 TEX. B.J. 988 (1975). But see Sampson, *supra* note 4, at 1033 n.20.

20. See TEX. R. CIV. P. 109, 110, 111, 113, 117a.

21. TEX. R. CIV. P. 109a.

22. See Sampson, *Distant Forum Abuse in Consumer Transactions: A Proposed Solution*, 51 TEXAS L. REV. 269 (1973).

23. TEX. REV. CIV. STAT. ANN. art. 1995, subd. 5(b) (Supp. 1975-76).

24. 525 S.W.2d 282 (Tex. Civ. App.—Eastland 1975, no writ).

and *Amaya v. Texas Securities Corp.*<sup>25</sup> In *Castleberry* a "consumer transaction" was held to include the purchase by an individual of feed to be used in a ranching operation consisting of 3,000 acres of land and \$350,000 worth of cattle.<sup>26</sup> Similarly, in *Amaya* a contract for paving improvements to the street abutting the defendants' home was held to arise out of a "consumer transaction" within the meaning of subdivision 5.<sup>27</sup>

The venue treatment of ancillary claims received substantial attention during the survey period. Section 2(g) of the Texas comparative negligence statute,<sup>28</sup> which provides that "[a]ll claims for contribution between named defendants in the primary suit shall be determined in the primary suit," was recently construed. Joining with an earlier case,<sup>29</sup> *LaSorsa v. Burr*<sup>30</sup> held that section 2(g) is a mandatory venue provision<sup>31</sup> and that where a crossclaim for contribution is asserted between defendants, the crossclaim is to be tried in the county where the court hearing the main suit is situated.<sup>32</sup>

*Hurst v. Stewart*<sup>33</sup> is also instructive in determining the venue of an ancillary claim. Considering a plea of privilege asserted by a plaintiff to a claim in intervention, the court held that the venue of the intervenor's claim cannot be challenged when it arises out of or is incidental to the subject matter of the plaintiff's claim.<sup>34</sup> Similarly, the court in *Miller v. Brown*<sup>35</sup> concluded that where venue of the primary claim is proper as to both defendants, venue will be proper in the same county as to all crossclaims arising out of the same transaction as the primary claim.<sup>36</sup>

Venue of a suit brought against a national banking association is governed by federal statute.<sup>37</sup> As a result, it is well established that a suit against a national bank must be brought in the county of its domicile.<sup>38</sup> Nevertheless, overruling a national bank's plea of privilege in an action brought against it for wrongful garnishment, the Fort Worth court of civil appeals recently concluded that the bank's unlawful conduct in the county of suit constituted a waiver of its federal venue rights.<sup>39</sup>

### III. PLEADINGS

Rule 185<sup>40</sup> provides that when any action is founded upon an open ac-

25. 527 S.W.2d 218 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (2-1 decision).

26. 525 S.W.2d at 285.

27. 527 S.W.2d at 222.

28. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Supp. 1975-76).

29. *Goodyear Tire & Rubber Co. v. Edwards*, 512 S.W.2d 748 (Tex. Civ. App.—Tyler 1974, no writ).

30. 516 S.W.2d 265 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

31. See TEX. REV. CIV. STAT. ANN. art. 1995, subd. 30 (1964); see, e.g. *Langdeau v. Burke Inv. Co.*, 163 Tex. 526, 358 S.W.2d 553 (1962).

32. 516 S.W.2d at 269-70.

33. 526 S.W.2d 668 (Tex. Civ. App.—San Antonio 1975, writ dism'd).

34. *Id.* at 670.

35. 528 S.W.2d 107 (Tex. Civ. App.—Amarillo 1975, no writ).

36. *Id.* at 110.

37. 12 U.S.C. § 94 (1970).

38. See, e.g., *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963).

39. *Texas Commerce Bank Nat'l Ass'n v. Tripp*, 516 S.W.2d 256 (Tex. Civ. App.—Fort Worth 1974, writ granted).

40. TEX. R. CIV. P. 185.

count "on which a systematic record has been kept" and is supported by the affidavit of the plaintiff to the effect that the claim is "just or true" and "due" and that "all just and lawful offsets, payments and credits have been allowed," the sworn account "shall be taken as prima facie evidence thereof." The Dallas court of civil appeals reiterated that in order for a sworn account to be accorded the evidentiary effect afforded by rule 185, the account must show on its face with reasonable certainty the nature of each item sold, the date of each sale and the reasonable charge therefor.<sup>41</sup> As a result of the failure to so specify, a general denial was held sufficient to put the matters in issue such that a summary judgment was not proper. Two other cases<sup>42</sup> during the survey period concluded that where the obligation alleged in the petition did not conform to the account attached as an exhibit to the petition, the account controlled over the allegations in the petition.

#### IV. LIMITATIONS

The "discovery of the cause of action rule," which has been held applicable to several types of actions,<sup>43</sup> established that the pertinent statute of limitations would not commence to run until the discovery of the true facts giving rise to the claimed damage, or on the date discovery should reasonably have been made. Superseding the "discovery of the cause of action rule" in medical malpractice cases, the Texas Insurance Code has been amended to provide,

[N]o claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law, as amended, whether for breach of express or implied contract or tort, for compensation for medical treatment or hospitalization may be commenced *unless* the action is filed within two years of the breach or the tort complained of or from the date of the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed . . . ."<sup>44</sup>

Since virtually all physicians and hospitals providing medical treatment maintain professional liability insurance, a claim for malpractice against a physician or hospital must be filed within two years from the date of the treat-

41. *Unit, Inc. v. Ten Eyck-Shaw, Inc.*, 524 S.W.2d 330, 333 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.). The courts of civil appeals have often similarly stated the requirement. See, e.g., *Big K Furniture Co. v. Covey Co.*, 511 S.W.2d 329, 330 (Tex. Civ. App.—Austin 1974, no writ); *United States Insulation Sales Corp. v. Jones-Blair Co.*, 491 S.W.2d 226, 227 (Tex. Civ. App.—Dallas 1973, no writ).

42. *Hassler v. Texas Gypsum Co.*, 525 S.W.2d 53, 54 (Tex. Civ. App.—Dallas 1975, no writ); *Dean v. K-C Fuel Co.*, 524 S.W.2d 805, 806 (Tex. Civ. App.—Austin 1975, no writ).

43. See *Thrift v. Tenneco Chems., Inc.*, 381 F. Supp. 543 (N.D. Tex. 1974) (breach of warranty by drug manufacturer); *Hays v. Hall*, 488 S.W.2d 412 (Tex. 1972) (unsuccessful vasectomy by physician); *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967) (foreign object left in body by surgeon); *Atkins v. Crosland*, 417 S.W.2d 150 (Tex. 1967) (negligent preparation of tax return by accountant). See also *Perdue, The Law of Texas Medical Malpractice*, 11 HOUS. L. REV. 825, 839 (1974); Note, *Limitation of Actions*, 46 TEXAS L. REV. 119 (1967).

44. TEX. INS. CODE ANN. art. 5.82, § 4 (Supp. 1975-76) (emphasis added).

ment for which damages are being sought, irrespective of when the true facts giving rise to the claimed damages were, or should have been, discovered.

Section 2.725 of the Texas Business and Commerce Code<sup>45</sup> provides that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." The supreme court has authoritatively ruled that section 2.725 extends to four years the statute of limitations applicable to an open account or oral contract for the sale of goods and materials.<sup>46</sup> However, the supreme court cautions that suits on sworn account which are not founded on breach of a "contract for sale"<sup>47</sup> are not governed by section 2.725.

## V. PARTIES

*Williams v. Saxon*,<sup>48</sup> following in the footsteps of an earlier case,<sup>49</sup> emphasizes the liberality of rule 39<sup>50</sup> as regards joinder of parties. The purchaser brought suit against the husband for specific performance of a contract to convey certain community property. Appealing from a judgment in favor of the purchaser, the husband contended that his wife was an indispensable party to the action, since it involved community property which constituted the family homestead, and that failure to join the wife rendered the judgment void. Concluding that rule 39 permitted the resolution of the action without the joinder of the wife, the court held that the judgment was valid and binding upon the husband except to the extent that it might have to be disregarded in according the wife her homestead rights.<sup>51</sup>

Two cases which may be of interest to the estate practitioner are *Jennings v. Srp*<sup>52</sup> and *Martinez v. Angerstein*.<sup>53</sup> The conclusion of the court

45. TEX. BUS. & COMM. CODE ANN. § 2.725 (1968).

46. *Big D Serv. Co. v. Climatrol Indus., Inc.*, 523 S.W.2d 236 (Tex. 1975), *refusing application for writ of error*, 514 S.W.2d 148 (Tex. Civ. App.—Texarkana 1974); *accord*, *Wilson v. Browning Arms Co.*, 501 S.W.2d 705 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd); *Ideal Builders Hardware Co. v. Cross Constr. Co.*, 491 S.W.2d 228 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ); *see* Spies, *Uniform Commercial Code: Article 2—Sales; Performance and Remedies*, 44 TEXAS L. REV. 629, 638-39 (1966); Teofan, *Commercial Transactions, Annual Survey of Texas Law*, 23 Sw. L.J. 88, 93 (1969).

47. TEX. BUS. & COMM. CODE ANN. § 2.106 (1968) provides that a "[c]ontract for sale" includes both a present sale of goods and a contract to sell goods at a future time." Further, "[g]oods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action." *Id.* § 2.105.

48. 521 S.W.2d 88 (Tex. Civ. App.—San Antonio 1975, no writ).

49. *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200 (Tex. 1974), *noted in* 52 TEXAS L. REV. 1410 (1974).

50. TEX. R. CIV. P. 39.

51. In the action against the husband, the jury found that the property in question did not have a homestead character at the time the contract to convey was executed. However, this finding was held not to be binding on the wife, who was not named as a party, and as between her interests and those of the purchaser, the issue of abandonment of a homestead claim must be heard in another case. 521 S.W.2d at 90-91. Even if found to be homestead property in such a later suit, contrary to the earlier ruling, specific performance may still be ordered if it is found that both spouses have joined in the contract to convey the homestead. TEX. FAM. CODE ANN. § 5.81 (1975); *Allen v. Monk*, 505 S.W.2d 523 (Tex. 1974), *noted in* 28 Sw. L.J. 787 (1974).

52. 521 S.W.2d 326 (Tex. Civ. App.—Corpus Christi 1975, no writ). *See also* *Crickmer v. King*, 507 S.W.2d 314 (Tex. Civ. App.—Texarkana 1974, no writ).

53. 517 S.W.2d 811 (Tex. Civ. App.—Corpus Christi 1974, writ dism'd).

in *Jennings* is that all devisees and legatees named in a will are indispensable parties to an action to contest the will, and additionally, when a construction or contest of the will would result in any of the estate passing by intestate succession, the heirs at law of the decedent are also indispensable parties to the action. *Martinez* reiterates that an action to recover funeral expenses and damages for pain and suffering survives to the heir or legal representatives of the decedent and that they are, therefore, indispensable parties to such action.

## VI. DISCOVERY

The most significant case during the survey period dealing with discovery is *Ex parte Butler*.<sup>54</sup> The state brought suit against an individual defendant seeking injunctive relief and civil penalties. During the taking of his deposition, the defendant refused to answer a question on the grounds that it might tend to incriminate him. After warning the defendant of the probable consequences if he should persist in his refusal, and still obtaining no answer, the trial court found him in contempt and assessed his punishment at three days in jail and a fine of \$100. Granting the defendant's petition for writ of habeas corpus, the supreme court recognized the application of the privilege against self-incrimination to a civil proceeding. The court's holding fell into several categories. First, since the suit is a civil action, the state may properly call the defendant as a witness or take his deposition. Upon becoming a witness, however, the defendant does not lose his right against self-incrimination. Second, when a witness invokes his privilege against self-incrimination and refuses to answer, the trial court must determine whether the refusal is justified. Before the witness is compelled to answer, the trial court must conclude, from a careful consideration of all of the circumstances, that the witness is mistaken and that the answer cannot possibly have a tendency to incriminate.<sup>55</sup> Third, the invocation of the privilege against self-incrimination must be predicated upon the threat of criminal penalties, not upon a threat of civil penalties.

*Texas Employers' Insurance Ass'n v. Thomas*<sup>56</sup> is an indication that the duty imposed by rule 168<sup>57</sup> to supplement answers to interrogatories may be without sanction. Prior to trial the defendant had served extensive interrogatories upon the plaintiff, including one inquiring whether the plaintiff had employed any experts to testify at the trial. The interrogatory was answered in the negative. Although the answer was correct at the time it was made, two months later the plaintiff engaged an expert witness to testify at the trial. When the expert was called to testify at the trial, the defendant filed a motion for a mistrial or, in the alternative, that the expert not be allowed to testify. Acknowledging that the plaintiff should have supplemented his answer after engaging the expert, the appellate court nevertheless concluded that no ex-

54. 522 S.W.2d 196 (Tex. 1975).

55. *Id.* at 198; see *Hoffman v. United States*, 341 U.S. 479 (1951). See also Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 BROOKLYN L. REV. 121, 136 (1972).

56. 517 S.W.2d 832 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

57. TEX. R. CIV. P. 168.



press sanction is provided by rule 168 for the failure to supplement an answer, and that the trial court did not abuse its discretion in failing to grant a mistrial and in permitting the expert to testify, primarily because no new evidence was brought into the case through his testimony.

Favoring substance over form in deposition practice is *Hill v. Rich*,<sup>58</sup> a recent decision of the Austin court of civil appeals. The deposition of one of the plaintiffs, though properly taken and certified by the reporter, had not been signed at the time of its use at the hearing on the defendant's motion for summary judgment. Following the hearing, which resulted in a judgment in favor of the defendant, the deponent signed and filed his deposition without change. The plaintiffs contended on appeal that the deposition was incompetent to prove anything because at the time of the hearing it had not been sworn to or filed. Overruling this contention, the court held that the "[m]ere lack of signature will not justify suppression of a deposition, even when timely motion is made, unless the reasons for not signing impugn the verity or reliability of the deposition."<sup>59</sup>

The circumstances under which a trial court may allow a party to change his answers to interrogatories and replies to requests for admissions were considered in *Thomas v. International Insurance Co.*<sup>60</sup> During the course of the trial, at the request of the defendant, the trial court permitted the defendant to change its answer to a certain interrogatory and request for admission, both of which pertained to a material issue in the action.<sup>61</sup> The trial court also ordered plaintiff's counsel not to make any reference to the jury that the answers had been changed.<sup>62</sup> As a result, the amended answers were read to the jury and the jury was never informed that the answers had been changed. Implying that the defendant's request was not timely, the appellate court concluded that "it was error for the trial court to forbid the Plaintiff from offering evidence to explain to the jury the reasons behind the changed answers" and that "[t]he Plaintiff should have been permitted to impeach the Defendant's changed answers by a showing of the former answers, as well as the purported basis for changing the answers, just as impeachment would be proper for any other prior inconsistent statement."<sup>63</sup>

Rule 168<sup>64</sup> authorizes the service of written interrogatories "[a]t any time after a party has made appearance in the cause, or time therefor has elapsed

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58. 522 S.W.2d 597 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

59. *Id.* at 600.

60. 527 S.W.2d 813 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

61. It should be noted that TEX. R. CIV. P. 168, which governs interrogatory practice, provides that "a party is under a duty seasonably to amend his answer if he obtains information upon the basis of which (a) he knows that the answer was incorrect when made, or (b) he knows that the answer though correct when made is no longer true and the circumstances are such that a failure to amend the answer is in substance a knowing concealment." With respect to the amendment of answers to requests for admissions, TEX. R. CIV. P. 169 empowers the trial court to permit such amendment "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits."

62. Neither TEX. R. CIV. P. 168 nor 169 expressly authorize the trial court to suppress a reference to the change. *Cf.* TEX. R. CIV. P. 167a.

63. 527 S.W.2d at 820.

64. TEX. R. CIV. P. 168.

. . . ." Refusing to interpret rule 168 literally, the court in *Ana-Log, Inc. v. City of Tyler*<sup>65</sup> concluded that interrogatories filed in connection with a motion for new trial were improper on the basis that the use of the discovery rules is limited to pretrial proceedings.<sup>66</sup>

The trial lawyer anticipating litigation with the state should not overlook the Texas Open Records Act, article 6252-17(a),<sup>67</sup> as a means of discovery prior to suit.<sup>68</sup> Declaring that "all persons are . . . at all times entitled to full and complete information regarding the affairs of government,"<sup>69</sup> the Act provides that "[o]n application for public information to the custodian of information in a governmental body by any person, the custodian shall promptly produce such information for inspection or duplication, or both, in the offices of the governmental body."<sup>70</sup> Significantly, "[n]either the custodian nor his agent who controls the use of public records shall make any inquiry of any person who applies for inspection or copying of public records beyond the purpose of establishing the proper identification and the public records being requested . . . ."<sup>71</sup> When a request for records is made under the Act, however, one case<sup>72</sup> during the survey period has held that the governmental body is entitled to obtain in advance the "actual cost" of providing copies of such records.

The recent amendments to the Texas Rules of Civil Procedure have also had an impact on deposition practice. Rule 215c,<sup>73</sup> which is completely new, provides that any party may cause the testimony at a deposition to be recorded on videotape or other non-stenographic means, without leave of court, and such recording may be presented at trial in lieu of reading from the written record of the deposition. Any party intending to make a videotape or other non-stenographic recording of a deposition is required to give five days notice of such intention to all other parties by certified mail, return receipt requested. The expense of the non-stenographic recording is not a taxable cost unless, before the deposition is taken, the parties so agree or the court

65. 520 S.W.2d 819 (Tex. Civ. App.—Tyler 1975, no writ).

66. *But see* TEX. R. CIV. P. 621a.

67. TEX. REV. CIV. STAT. ANN. art. 6252-17(a) (Supp. 1975-76). *See also* Freedom of Information Act, 5 U.S.C.A. § 552 (Supp. 1975).

68. *See* Comment, *Right to Information and the FOIA: Shredding the Paper Curtain of Secrecy*, 11 HOUS. L. REV. 717 (1974); Comment, *Freedom of Information Act and Its Internal Memoranda Exemption: Time for a Practical Approach*, 27 SW. L.J. 806 (1973); Comment, *Texas Open Records Act: Law Enforcement Agencies' Investigatory Records*, 29 SW. L.J. 431 (1975). *But see* TEX. ATT'Y GEN. OP. NO. H-483 (1974).

69. TEX. REV. CIV. STAT. ANN. art. 6252-17(a), § 1 (Supp. 1975-76).

70. *Id.* § 4.

71. *Id.* § 5(b).

72. *Hendricks v. Trustees of Spring Branch*, 525 S.W.2d 930, 932 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

73. TEX. R. CIV. P. 215c. For recent relevant articles on this subject see Kennelly, *The Practical Uses of Trialvision and Deposition*, in 16 J. KENNELLY, TRIAL LAWYER'S GUIDE 183 (1972); Brennan, *Videotape—The Michigan Experience*, 24 HASTINGS L.J. 1 (1972); Kornblum, *Videotape in Civil Cases*, 24 HASTINGS L.J. 9 (1972); McGill & Thrasher, *Videotapes: The Reel Thing of the Future*, 11 TRIAL 43 (1975); Merlo & Sorenson, *Videotape: The Coming Courtroom Tool*, 7 TRIAL 55 (1971); Miller, *Videotaping the Oral Deposition*, 18 PRAC. LAW. 45 (1972); Comment, *Videotape Evidence: Technological Innovation in the Trial Process*, 36 ALA. LAW. 228 (1975). Note that the requirement of a written record under TEX. R. CIV. P. 206 greatly diminishes the value of non-stenographic recording.

so orders on motion and notice. Generally, the making of a non-stenographic recording will not dispense with the requirement of a written record of the deposition.

## VII. SUMMARY JUDGMENT

The intricacy of summary judgment procedure is illustrated by *Zale Corp. v. Rosenbaum*.<sup>74</sup> Plaintiff brought suit against defendants for alleged negligent construction of a building which resulted in flood damage. Defendants denied liability, and asserted the two-year statute of limitations as an affirmative defense. The plaintiff sought to defeat the limitations defense by urging that it had exercised diligence in procuring issuance and service of citation, and that the limitations period had been suspended as a result of the defendants' absence from the state. Granting defendants' motion for summary judgment, the trial court concluded that the defense of limitations had been established by showing the date the cause of action arose, the date the plaintiff's petition was filed, and the date that issuance of citation was requested. Reversing the summary judgment in favor of the defendants, the supreme court held that "[w]here the non-movant interposes a suspension statute . . . or pleads diligence in requesting issuance of citation, the limitation defense is not conclusively established until the movant meets his burden of negating the applicability of these issues."<sup>75</sup>

Article 2226,<sup>76</sup> which authorizes the recovery of attorney's fees in specified cases, was amended in 1971 to provide that "[t]he amount prescribed in the current State Bar Minimum Fee Schedule shall be prima facie evidence of reasonable attorney's fees," and that "[t]he court, in non-jury cases, may take judicial knowledge of such schedule and of the contents of the case file in determining the amount of attorney's fees without the necessity of hearing further evidence." Prior to this amendment, it was well settled that the reasonableness of an attorney's fee—an issue of fact—could only be established by opinion evidence, and that opinion adduced by affidavit on a motion for summary judgment was insufficient to establish such fact as a matter of law.<sup>77</sup> Resolving a conflict in the decisions of the courts of civil appeals,<sup>78</sup> the Texas Supreme Court in *Coward v. Gateway National Bank*<sup>79</sup> concluded that the "prima facie evidence" of a reasonable attorney's fee established by the fee schedule was insufficient to sustain the burden of a movant under rule 166-A<sup>80</sup> with respect to the reasonableness issue.

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74. 520 S.W.2d 889 (Tex. 1975) (per curiam).

75. *Id.* at 891.

76. TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1975-76).

77. See, e.g., *Gibbs v. General Motors Corp.*, 450 S.W.2d 827 (Tex. 1970); *Lancaster v. Wynnewood State Bank*, 470 S.W.2d 78 (Tex. Civ. App.—Waco 1971, no writ). But see *Bagby Land & Cattle Co. v. California Livestock Comm'n Co.*, 439 F.2d 315, 318 (5th Cir. 1971).

78. Compare *Coward v. Gateway Nat'l Bank*, 515 S.W.2d 129 (Tex. Civ. App.—Beaumont 1974), *rev'd*, 525 S.W.2d 857 (Tex. 1975), *McDonald v. Newlywed's, Inc.*, 483 S.W.2d 334 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.), and *Superior Stationers Corp. v. Berol Corp.*, 483 S.W.2d 857 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ), with *Stafford v. Brennan*, 498 S.W.2d 703 (Tex. Civ. App.—Corpus Christi 1973, no writ), and *Duncan v. Butterowe, Inc.*, 474 S.W.2d 619 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

79. 525 S.W.2d 857 (Tex. 1975).

80. TEX. R. CIV. P. 166-A.

Rule 166-A, which governs summary judgment practice, stipulates that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein."<sup>81</sup> Reviewing an affidavit which stated "[u]pon the default . . . in the payment of the note," the entire unpaid balance of principal and accrued interest was declared immediately due and payable, the Dallas court of civil appeals held that such statement amounted to a legal conclusion and could not support a summary judgment since the note specified several occurrences which would amount to a "default" under its terms.<sup>82</sup>

### VIII. SPECIAL ISSUE SUBMISSION

Several decisions during the survey period focused on the scope of submission of special issues under rule 277.<sup>83</sup> Abolishing the former requirement that special issues be submitted distinctly and separately,<sup>84</sup> rule 277 now provides that "[it] shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly," and that "[i]t shall not be objectionable that a question is general or includes a combination of elements or issues."<sup>85</sup> Giving this language full effect, the Dallas court of civil appeals, in *Shasteen v. Mid-Continent Refrigerator Co.*,<sup>86</sup> approved the submission of the defense of fraudulent representation in a *single* issue.<sup>87</sup> However, the holding in *Shasteen* should not be construed to be an indication that under rule 277 a general issue would never be subject to the objection that it is prejudicially multifarious. The court cautioned that a different question would have been posed if the jury had answered the issue in the affirmative rather than in the negative and the plaintiff had appealed on the basis that the issue was prejudicial in permitting the jury to consider representations pleaded but not raised by the evidence or to consider promissory statements legally insufficient as grounds of fraud.<sup>88</sup> In such a situation the court concluded that it would have to determine whether any harm to the plaintiff resulted from the general language of the issue.

Faced with the question posed but not decided in *Shasteen*, a Houston court of civil appeals in *Members Mutual Insurance Co. v. Muckelroy*<sup>89</sup> ap-

81. TEX. R. CIV. P. 166-A(e).

82. *Skeen v. Glenn Justice Mortgage Co.*, 526 S.W.2d 252, 254 (Tex. Civ. App.—Dallas 1975, no writ), noted in 29 Sw. L.J. 959 (1975).

83. TEX. R. CIV. P. 277.

84. See TEX. R. CIV. P. 277 (1967). See also *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922).

85. TEX. R. CIV. P. 277; see Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577 (1973).

86. 517 S.W.2d 437 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

87. The single issue submission approved by the court inquired: "Do you find from a preponderance of the evidence that prior to the signing of the written agreement in question in this case the representative of the Plaintiff made false representations as to material facts to the Defendant with the intent of inducing him to sign said agreement?" *Id.* at 438. The jury answered the issue in the negative. *Id.*

88. *Id.* at 439.

89. 523 S.W.2d 77 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

pears to have concluded that a general submission will never be prejudicially multifarious. Over the defendant's objection that it failed to limit the jury to a consideration of the specific acts and omissions of negligence alleged,<sup>90</sup> the trial court submitted a special issue to the jury inquiring "Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision made the basis of this suit?"<sup>91</sup> The issue was followed by three possible answers: the defendant, the plaintiff, or both. Following a finding on the issue and entry of judgment in favor of the plaintiff, the defendant appealed. The court of civil appeals, relying on a statement by the supreme court in an earlier case,<sup>92</sup> held that "the trial court is not precluded from submitting issues broadly under Rule 277 even though specific acts or omissions comprising the elements of such issue have been specifically plead."<sup>93</sup>

*Muckelroy* is also informative in its treatment of limiting instructions where a general submission is used. The defendant, in an effort to restrict the scope of the negligence issue, had requested the trial court to give the jury instructions limiting their consideration of negligence to the acts and omissions alleged. Conceding that "an instruction limiting the jury's consideration to only those acts of negligence pleaded might properly be given by the trial court in an appropriate situation,"<sup>94</sup> the court nevertheless found that the trial court had not abused its discretion in refusing to give the limiting instructions requested by the defendant.

Rule 277<sup>95</sup> provides that "[t]he court may submit special issues in a negligence case in a manner that allows a listing of the claimed acts or omissions of any party to an accident, event, or occurrence that are raised by the pleadings and the evidence with appropriate spaces for answers as to each act

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90. Specifically, the defendant contended that "notwithstanding the revision of Rule 277, the issues must be limited by the form of submission to those specific acts of negligence which are specially alleged in the pleadings" and that the issue "permitted the jury to consider evidence of other possible negligent acts not raised by the pleadings, as for example, testimony from which the jury might have inferred that [defendant] had been drinking prior to the accident and that she had failed to give a turn signal indicating her intended left turn." *Id.* at 82.

91. *Id.* at 79.

92. In *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974), with reference to rule 277, the Texas Supreme Court had observed that: "The rule means that in an ordinary negligence case, where several specific acts of negligence are alleged and evidence as to each is introduced, the submission of a broad issue inquiring generally whether the defendant was negligent is not error and is not subject to the objection that the single issue inquires about several elements or issues."

93. 523 S.W.2d at 82. In addressing the defendant's contentions, the court stated that:

The purpose of the pleadings is to apprise the opposing parties of the nature of the issues which they will be expected to meet. By appropriate special exceptions, the plaintiff may be required to specify the particular acts or omissions of negligence upon which he relies. If during the trial evidence is offered regarding any claimed acts or omissions not raised by the pleadings, the receipt of such evidence may be properly controlled by ruling of the court. Under the revised rule, where the broad form of submission is adopted, the extent of the jury's consideration of the elements comprising the controlling issue becomes a matter of evidence and argument, subject to appropriate instruction of the court.

*Id.*

94. *Id.* at 83.

95. TEX. R. CIV. P. 277.

or omission which is listed." Focusing on this provision, the court in *Muckelroy* further concluded that while rule 277 authorizes the use of a checklist submission, the trial court is not required to adopt that form of submission.

Even though rule 277 authorizes special issues to be submitted broadly, the court in *Cactus Drilling Co. v. Williams*<sup>96</sup> held that the submission of a special issue which assumes a disputed fact or is phrased so as to elicit an ambiguous response is defective and constitutes reversible error.

*Stacks v. Rushing*<sup>97</sup> presented an unusual situation. Although the trial court submitted an ambiguous issue to the jury,<sup>98</sup> the plaintiff made no objection to it prior to the reading of the charge to the jury. During its deliberation, the jury wrote the trial court a note inquiring as to the meaning of the issue and seeking a clarifying instruction. Over the objection of the plaintiff, the trial court responded that no further instructions concerning the issue could be given. Observing that rule 286<sup>99</sup> authorized the trial court to give a clarifying instruction, the court of civil appeals concluded that the failure of the trial court to do so constituted reversible error, as the note from the jury demonstrated that the issue was ambiguous. Although the plaintiff's failure to object to the original submission of the issue on grounds of ambiguity constituted a waiver of such objection, this waiver did not extend to the objection made to the trial court's response to the note.

## IX. JURY PRACTICE

*Stephens County Museum, Inc. v. Swenson*,<sup>100</sup> a recent decision of the Texas Supreme Court, confirms the principle that a misinterpretation or misunderstanding of the charge on the part of the jury does not constitute jury misconduct. Two elderly sisters brought suit to set aside certain contributions they had made to a museum, claiming that they did not understand the nature of the transactions and were unduly influenced. After the jury found that the sisters did not understand the transactions and that they were acting under undue influence when they made the contributions, the defendants filed a motion for new trial complaining of jury misconduct. At the hearing on the motion the foreman of the jury testified that the jury reasoned that if the sisters did not understand the nature and subject matter of each

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96. 525 S.W.2d 902 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.).

97. 518 S.W.2d 611 (Tex. Civ. App.—Dallas 1974, no writ).

98. The special issue asked whether "defendant . . . agreed or promised to repair the floor in question on or before February 9, 1972." *Id.* at 613. The issue submitted was ambiguous in the wordings as to whether the question concerned the date on which the alleged promise was made or the date upon which the promised action was to occur.

99. TEX. R. CIV. P. 286, which governs the submission of supplemental instructions to the jury, provides that:

After having retired, the jury may receive further instructions of the court touching any matter of law, either at their request or upon the court's own motion. For this purpose they shall appear before the judge in open court in a body, and if the instruction is being given at their request, they shall through their foreman state to the court, in writing, the particular question of law upon which they desire further instruction. The court shall give such instruction in writing, but no instruction shall be given except in conformity with the rules relating to the charge. Additional argument may be allowed in the discretion of the court.

100. 517 S.W.2d 257 (Tex. 1974), *rev'g in part* 499 S.W.2d 676 (Tex. Civ. App.—Eastland 1973).

transaction, it would necessarily follow that they had been unduly influenced.<sup>101</sup> Concluding that the conduct of the jury in this case was an effort on its part to follow its own reasoning, rather than properly applying the court's charge, the supreme court held that it is not misconduct to misinterpret or misunderstand the court's charge.<sup>102</sup>

*Heddin v. Delhi Gas Pipeline Co.*<sup>103</sup> is a warning that photographs which are calculated to arouse the sympathy, prejudice, or passion of the jury and do not serve to illustrate disputed issues or aid the jury in its understanding of the case should not be shown to the jury. A pipeline company brought an action against landowners to condemn land for the purpose of laying a gas transmission pipeline. Over the objection of the pipeline company, the landowners introduced several photographs of the carcasses of cattle and family pets killed by gas which had escaped when another gas transmission pipeline ruptured eight months after the date of taking. Observing that the photographs had no relevance to the disputed issues, the supreme court concluded, by examining the method of proof, that the pictures were introduced for their shock value, rather than to rebut an implication that the pipeline was not dangerous. As a result, the court found that the showing of the photographs to the jury probably caused the rendition of an improper judgment.

#### X. JUDGMENT

Adding to an existing conflict in the decisions of the courts of civil appeals,<sup>104</sup> the court in *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*<sup>105</sup> condemned the entry of a default judgment on a claim for unliquidated damages where no record of the supporting evidence had been made in the trial court. Under rule 241<sup>106</sup> a default does not have the effect of admitting allegations of damages unless the claim is liquidated and proved by an instrument in writing. If the claim is unliquidated, rule 243<sup>107</sup> stipulates that "the court shall hear evidence as to damages." The defaulting defendant in *Morgan Express, Inc.* formally requested a statement of facts on the presentation of plaintiff's evidence on his unliquidated claim, but the reporter certified that he was unable to comply with the request because he was not present when the evidence was given and no other reporter recorded the testimony.

101. The relevant testimony of the foreman of the jury is set forth in the opinion of the court of civil appeals. 499 S.W.2d at 684-85.

102. 517 S.W.2d at 260; accord, *Adams v. Houston Lighting & Power Co.*, 158 Tex. 551, 314 S.W.2d 826 (1958); *Whited v. Powell*, 155 Tex. 210, 285 S.W.2d 364 (1956); see *Burchfield v. Tanner*, 142 Tex. 404, 178 S.W.2d 681 (1944).

103. 522 S.W.2d 886 (Tex. 1975).

104. Compare *Parker v. Sabine Valley Lumber Co.*, 485 S.W.2d 853 (Tex. Civ. App.—Fort Worth 1972, no writ), *Harris v. Lebow*, 363 S.W.2d 184 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.), and *Johnson v. Brown*, 218 S.W.2d 317 (Tex. Civ. App.—Beaumont 1948, writ ref'd n.r.e.), with *Mitchell v. Hunsaker Mfg., Inc.*, 520 S.W.2d 796 (Tex. Civ. App.—Waco 1975, no writ), *Dugie v. Dugie*, 511 S.W.2d 623 (Tex. Civ. App.—San Antonio 1974, no writ), and *James Edmond, Inc. v. Schilling*, 501 S.W.2d 432 (Tex. Civ. App.—Waco 1973, no writ).

105. 525 S.W.2d 312 (Tex. Civ. App.—Dallas 1975, writ ref'd), followed in *Wallace v. Snyder Nat'l Bank*, 527 S.W.2d 485 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).

106. TEX. R. CIV. P. 241.

107. TEX. R. CIV. P. 243.

If the trial court has an official reporter, article 2324<sup>108</sup> requires him to "[a]ttend all sessions of the court" and to "take full shorthand notes of all oral testimony offered." When the reporter fails to comply with article 2324, the court concluded in *Morgan Express, Inc.*, the default judgment must be set aside and the case remanded for a new trial.<sup>109</sup> Furthermore, the defaulting defendant is not required to show that he was unable to obtain a statement of facts by agreement or by request of the trial judge.<sup>110</sup> In this regard, the court observed that "an appellant who was not present and was not represented when the testimony was taken is in no position to agree with his opponent concerning the substance of the testimony, and neither should he be required to rely on the unaided memory of the trial judge, who, though presumably fair, has already decided the merits of the case against the appellant."<sup>111</sup> Since an application for writ of error was refused by the supreme court, the principles of law announced in *Morgan Express, Inc.* should be considered as having been correctly determined.<sup>112</sup>

*Frymire Engineering Co. v. Grantham*<sup>113</sup> confirmed the principle that where the defendant has filed an answer, the plaintiff is required to prove his case even though the defendant fails to appear at the trial. "If defendant has filed an answer placing in issue the merits of plaintiff's cause of action," reasoned the supreme court, "defendant's failure to appear at the trial is neither an abandonment of defendant's answer nor is it an implied confession of any issues thus joined by the defendant's answer."<sup>114</sup>

In order to set aside a final judgment through the use of an equitable bill of review, the landmark decision of *Alexander v. Hagedorn*<sup>115</sup> established that the party seeking such relief "must allege and prove: (1) a meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making by the fraud, accident or wrongful act of the opposite party, (3) unmixed with any fault or negligence of his own."<sup>116</sup> Reviewing an appeal from a bill of review judgment, the supreme court recently approved a holding "that proof of defendant not having been served with citation obviates the necessity of pleading and proving the second *Hagedorn* requirement."<sup>117</sup>

*Plains Growers, Inc. v. Jordan*,<sup>118</sup> a sharply divided decision of the supreme court during a previous survey period, opened a Pandora's box of pro-

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108. TEX. REV. CIV. STAT. ANN. art. 2324 (1971). Furthermore, the trial judge has the responsibility to see that the reporter complies with art. 2324. *Ex parte Thompson*, 520 S.W.2d 955 (Tex. Civ. App.—Dallas, no writ), *modified*, 529 S.W.2d 782 (Tex. Civ. App.—Dallas 1975, no writ).

109. Note that the opinion is unclear as to whether a new trial is to be given on the liability issue as well as the issue of damages.

110. *See* TEX. R. CIV. P. 377.

111. 525 S.W.2d at 315.

112. TEX. R. CIV. P. 483; *see, e.g.*, *Hamilton v. Empire Gas & Fuel Co.*, 134 Tex. 377, 383, 110 S.W.2d 561, 565-66 (1937); *Ohler v. Trinity Portland Cement Co.*, 181 S.W.2d 120, 123 (Tex. Civ. App.—Galveston 1944, no writ).

113. 524 S.W.2d 680 (Tex. 1975) (per curiam).

114. *Id.* at 681.

115. 148 Tex. 565, 226 S.W.2d 996 (1950).

116. *Id.* at 568-69, 226 S.W.2d at 998.

117. *Texas Indus., Inc. v. Sanchez*, 525 S.W.2d 870, 871 (Tex. 1975) (per curiam).

118. 519 S.W.2d 633 (Tex. 1974) (5-4 decision).



cedural ills.<sup>119</sup> To remedy these ills, rule 245<sup>120</sup> was amended to provide that "[t]he court may set contested cases on motion of any party, or on the court's own motion, with reasonable notice of not less than 10 days to the parties, or by agreement of the parties." Thus, notice to the parties must be given whether the trial judge or a party moves to set the case for trial. Furthermore, amended rule 245 dictates that "[w]ith respect to a party who had no notice of setting of a contested case for trial, the provisions of Rule 329b governing motions for new trial and finality of judgments shall operate from the time of receipt of notice of rendition of the judgment; provided that the original motion for new trial shall in any event be filed within 90 days from the rendition of judgment."

Two other developments in the area of judgments should be of interest to the trial attorney. First, in order to keep pace with rising interest rates, article 5069<sup>121</sup> was amended to provide that "[a]ll judgments of the courts of this State shall bear interest at the rate of nine percent per annum from and after the date of the judgment." Second, as a result of the recent amendments to the Texas Rules of Civil Procedure, an execution upon a judgment may not be issued by the clerk until after the expiration of thirty days from the rendition of a final judgment and after the overruling of any motion for new trial.<sup>122</sup>

#### XI. MOTION FOR NEW TRIAL

In a step toward judicial economy, rule 320,<sup>123</sup> which governs motion for new trial practice, was amended to authorize a retrial on less than all of the matters in controversy. Thus, "[w]here it appears to the court that a new trial should be granted on a ground or grounds that affect only a part of the matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only."<sup>124</sup> However, "a separate trial on unliquidated damages alone shall

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119. During a monthly call of its docket, the trial court, on request of the plaintiff's counsel, set the case for trial within an hour. The defendant's counsel, who resided in another county, was not notified of the trial setting. The case was called for trial at the time set, evidence was presented, and judgment was rendered in favor of the plaintiff. The postcard notice of the judgment required by TEX. R. CIV. P. 306d was mailed by the clerk on the tenth day after entry of the judgment and received by defendant's counsel the following day. On the sixteenth day, the defendant filed a motion for new trial contending that the judgment, entered without notice of the trial setting and without allowing an adequate opportunity to prepare for trial, was void. Under former TEX. R. CIV. P. 330(b), "by agreement of the parties, or on motion of either party, or on the court's own motion with notice to the parties, the court may set any case for trial at any time so as to allow the parties reasonable time for preparation." On the basis of the comma following the words "either party," a majority of the court concluded that former rule 330(b) required notice to the parties only when a case is set by the trial court on its own motion. Consequently, since the judgment was not void, the majority of the court concluded that it could not be collaterally attacked. See Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 29 SW. L.J. 265, 280 (1975).

120. TEX. R. CIV. P. 245. Additionally, TEX. R. CIV. P. 330(b) was repealed effective January 1, 1976.

121. TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (Supp. 1975-76).

122. TEX. R. CIV. P. 627.

123. TEX. R. CIV. P. 320; see TEX. R. CIV. P. 434, 503. See generally Pope & Sheehan, "Try, Try, Again . . ."—*A Proposal To Limit the Scope of New Trials in Texas*, 7 ST. MARY'S L.J. 1 (1975).

124. TEX. R. CIV. P. 320.

not be ordered if liability issues are contested."<sup>125</sup>

## XII. APPELLATE PROCEDURE

Prior to 1973 the Texas Constitution<sup>126</sup> provided for appellate jurisdiction in probate matters in the district court. The Probate Code reiterated in section 5<sup>127</sup> the appellate jurisdiction of the district court, authorized in section 28<sup>128</sup> a right of appeal from the probate court to the district court, and provided in section 30<sup>129</sup> that the proceeding in the county court could be corrected by certiorari. In 1973 the Texas Constitution and section 5 of the Probate Code were amended to provide that all appeals from the county court in probate matters shall be to the court of civil appeals.<sup>130</sup> In *Cluck v. Hester*<sup>131</sup> the Texas Supreme Court concluded that section 28 of the Probate Code was repealed through implication by the 1973 amendment to section 5 and that a right of appeal from the probate court to the district court no longer exists. Noting that appeal and certiorari are concurrent and alternative remedies, however, the court concluded that section 30 was not repealed by implication and that review of probate matters in the district court by certiorari still obtained.<sup>132</sup> Following the decision in *Cluck*, the legislature repealed section 30 of the Probate Code<sup>133</sup> and eliminated review by certiorari of probate matters in the district court.

Prior to its amendment rule 386<sup>134</sup> stipulated:

In appeal or writ of error the appellant shall file the transcript and statement of facts with the clerk of the Court of Civil Appeals within sixty days from the rendition of the final judgment or order overruling motion for new trial, or perfection of writ of error; provided [that] by motion filed before, at, or within a reasonable time, not exceeding fifteen days after the expiration of such sixty-day period, . . . the Court of Civil Appeals may permit the same to be thereafter filed upon such terms as it shall prescribe.

Due to the wording of rule 386, the cases having interpreted it were not always in agreement as to whether it empowered the court of civil appeals to grant a *second* motion for extension of time filed after the period fixed by a first extension order had expired.<sup>135</sup> Resolving the conflict, the Su-

125. *Id.* See generally *Iley v. Hughes*, 158 Tex. 362, 311 S.W.2d 648 (1958).

126. TEX. CONST. art. V, § 8 (1876).

127. Ch. 55, § 5, [1955] Tex. Laws 91.

128. Ch. 55, § 28, [1955] Tex. Laws 97.

129. Ch. 55, § 30, [1955] Tex. Laws 97.

130. TEX. CONST. art. V, § 8; TEX. PROB. CODE ANN. § 5(e) (Supp. 1975-76). As a result, TEX. R. CIV. P. 332-39, which governed the review of county court rulings by appeal to the district courts, were repealed.

131. 521 S.W.2d 845 (Tex. 1975); *accord*, *Butts v. Ailshie*, 521 S.W.2d 155 (Tex. Civ. App.—El Paso 1975, no writ).

132. 521 S.W.2d at 847-48.

133. Ch. 701, § 7, [1975] Tex. Laws 2197. Rendered unnecessary by the elimination of TEX. PROB. CODE ANN. § 30, TEX. R. CIV. P. 344-51, which governed the review by district courts of county court rulings by certiorari, were repealed.

134. TEX. R. CIV. P. 386 (1967).

135. Compare *First Nat'l Bank v. Hargrove*, 503 S.W.2d 856 (Tex. Civ. App.—Texarkana 1973, no writ), *Western United Realty Co. v. Shaw*, 356 S.W.2d 205 (Tex. Civ. App.—Eastland 1962, writ ref'd), and *Hodges v. Nix*, 225 S.W.2d 576 (Tex. Civ. App.—Galveston 1949, writ ref'd n.r.e.), with *Allen v. United Supermarkets, Inc.*, 467

preme Court of Texas, in *Crites v. Court of Civil Appeals*,<sup>136</sup> concluded that a court of civil appeals has jurisdiction to entertain a second motion for extension of time filed after expiration of the period set forth in the first extension order. The court reasoned that once a motion for extension has been filed during the seventy-five day period, the jurisdiction of the court of civil appeals has been invoked to grant further extensions.<sup>137</sup>

In order to eliminate the problem encountered in *Crites* and to liberalize the requirements for obtaining extensions of time on appeal, rule 21c<sup>138</sup> was enacted. It provides that "[t]he failure of a party to timely file a transcript, statement of facts, motion for rehearing in the court of civil appeals or application for writ of error, will not authorize a dismissal or loss of the appeal if the defaulting party files a motion reasonably explaining such failure in the court whose jurisdiction to make the next ruling in the case would be affected by such failure." The motion seeking the extension "must be filed within fifteen (15) days of the last date for timely filing . . . although it may be acted upon by the court at a date thereafter." In light of the addition of rule 21c, the language of rule 386<sup>139</sup> which had caused confusion was deleted.

*Texas State Board of Public Accountancy v. Fulcher*<sup>140</sup> is a comment on the United States mail service. Rule 5<sup>141</sup> provided that if "any matter relating to taking an appeal or writ of error from the trial court to any higher court . . . is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail one day or more before the last day for filing same . . . the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time." Significantly, "a legible postmark affixed by the United States Postal Service," continued rule 5, "shall be *conclusive* evidence of the date of mailing."<sup>142</sup> Attempting to take advantage of rule 5, the defendant deposited the envelope containing his motion for rehearing, properly addressed and stamped, in the United States mail on October 2, two days prior to the date it was required to be filed with the clerk of the court of civil appeals. The envelope was subsequently received by the clerk on October 7. Due to mechanical difficulties encountered by the United States postal service, however, the envelope was postmarked October 4, the date the motion was required to be filed. Refusing to give the postmark "conclusive" effect, the court in *Fulcher* deemed the motion for rehearing timely filed, observing "that the mails, since the original adoption of Rule 5 and the several amendments thereto, have become increasingly erratic and undependable."<sup>143</sup> In order to eliminate any future problems in this regard,

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S.W.2d 616 (Tex. Civ. App.—Amarillo 1971, no writ), and *Walker v. Kelley*, 395 S.W.2d 402 (Tex. Civ. App.—Waco 1965, no writ).

136. 516 S.W.2d 123 (Tex. 1974).

137. *Id.* at 124-25, quoting *Parks v. Purnell*, 135 Tex. 182, 141 S.W.2d 585 (1940).

138. TEX. R. CIV. P. 21c; see TEX. R. CIV. P. 386.

139. TEX. R. CIV. P. 386.

140. 515 S.W.2d 950 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

141. TEX. R. CIV. P. 5 (Supp. 1973).

142. *Id.* (emphasis added).

143. 515 S.W.2d at 958.

rule 5<sup>144</sup> was amended so "that a legible postmark affixed by the United States Postal Service shall be *prima facie* evidence of the date of mailing."

Construing rule 430<sup>145</sup> liberally, the supreme court, in *Woods Exploration & Producing Co. v. Arkla Equipment Co.*,<sup>146</sup> has held that "the clerk's certificate showing that a deposit has been made in lieu of an appeal bond may, when warranted by the facts, be amended to show that the deposit was made for the benefit of parties not named in the original certificate."<sup>147</sup> Three defendants, an individual and two corporations, each gave timely notice of appeal and, in lieu of a bond for costs on appeal, the individual defendant deposited a cashier's check with the clerk. The clerk's certificate, made pursuant to rule 354,<sup>148</sup> stated merely that the deposit was made by the individual defendant, without reference to the other defendants. Although the court of civil appeals concluded that only the individual defendant had perfected an appeal, the supreme court analogized the clerk's certificate in regard to the deposit in lieu of an appeal bond to an appeal bond itself. Although no rules specifically allow amendment of such certificates, the policy and reasoning behind rule 430 convinced the court that the clerk's certificate should likewise be amendable.

An oral notice of appeal which was given at the conclusion of a hearing on a motion for summary judgment was held by one court of civil appeals to be premature and ineffective where the order granting the summary judgment was not signed until some time later.<sup>149</sup> Although rule 306c<sup>150</sup> provides that a prematurely filed notice of appeal shall be deemed to have been filed on the date of but subsequent to the rendition of the judgment, the court found this rule to be applicable only to written notices of appeal.

In *Tejas Trail Property Owners Ass'n v. Holt*<sup>151</sup> a letter written by the trial judge to the attorneys in the case advising them of his ruling and the reasons for his decision was held not to constitute the findings of fact and conclusions of law of the trial court contemplated by rule 296,<sup>152</sup> even though the letter was included in the transcript.

Rule 272<sup>153</sup> previously required that when objections to the charge of the trial court are dictated to the court reporter, they must be transcribed, the court's ruling endorsed thereon, and filed with the clerk "in time to be included in the transcript." Construing former rule 272 strictly, the Waco court of civil appeals in *Southland Capital Corp. v. Clark*<sup>154</sup> refused to consider objections which were not transcribed until after the appeal had been

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144. TEX. R. CIV. P. 5 (emphasis added).

145. TEX. R. CIV. P. 430 provides that: "When there is a defect of substance or form in any appeal or writ of error bond, then on motion to dismiss the same for such defect, the appellate court may allow the same to be amended by filing in such appellate court a new bond, on such terms as the court may prescribe."

146. 528 S.W.2d 568 (Tex. 1975).

147. *Id.* at 569.

148. TEX. R. CIV. P. 354 (1967).

149. *Texas Gulf Coast Constr. Co. v. Houston Shell & Concrete*, 517 S.W.2d 650 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

150. TEX. R. CIV. P. 306c.

151. 516 S.W.2d 441 (Tex. Civ. App.—Fort Worth 1974, no writ).

152. TEX. R. CIV. P. 296.

153. TEX. R. CIV. P. 272 (1967).

154. 526 S.W.2d 278 (Tex. Civ. App.—Waco 1975, no writ).

perfected and were contained in a second supplemental transcript. Superceding the holding in *Clark*, amended rule 272<sup>155</sup> states that "[o]bjections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon."

The new amendments to the Texas Rules of Civil Procedure made sweeping changes in the area of appellate procedure. The giving of a notice of appeal has been eliminated as an appellate step except when a bond for costs on appeal is not required or the appellant seeks to limit the scope of an appeal to a specified portion of the judgment from which the appeal is taken.<sup>156</sup> An appeal is now perfected through the filing of a bond or cash deposit securing costs on appeal within thirty days after rendition of the judgment or order overruling motion for new trial.<sup>157</sup> When the bond is in the sum of \$500 no approval of it by the court is necessary.<sup>158</sup> The transcript and statement of facts still must be filed within sixty days from the rendition of judgment or order overruling motion for new trial,<sup>159</sup> unless the time is extended pursuant to rule 21c.<sup>160</sup>

### XIII. PREJUDGMENT REMEDIES

Article 6840,<sup>161</sup> which was recently amended in an attempt to avoid the deficiencies of its predecessor,<sup>162</sup> authorizes the issuance of a writ of sequestration in specified cases. The application for the issuance of the writ is required to be made under oath and set forth "specific facts" stating the nature of the claim, the amount in controversy, and the facts justifying the issuance.<sup>163</sup> Moreover, when a writ of sequestration has been issued under article 6840, the defendant may seek a dissolution of the writ by written motion filed with the court. A hearing on the motion to dissolve the writ must be held and the issue determined not later than ten days after the motion is filed. At the hearing, the court is required to dissolve the writ "unless the party who secured the issuance of the writ proves the specific facts alleged and the grounds relied upon for its issuance."<sup>164</sup> Although the sequestration statute was amended, rules 696-716,<sup>165</sup> dealing with procedure in sequestration actions, were left unchanged by the recent amendments to the Texas Rules of Civil Procedure.

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155. TEX. R. CIV. P. 272 (emphasis added).

156. See TEX. R. CIV. P. 353, 354, 358, 363, 376, 377, 386, 388.

157. TEX. R. CIV. P. 356, 363.

158. TEX. R. CIV. P. 354.

159. TEX. R. CIV. P. 386.

160. TEX. R. CIV. P. 21c.

161. TEX. REV. CIV. STAT. ANN. art. 6840 (Supp. 1975-76); see Comment, *Constitutional Dimensions of the Amended Texas Sequestration Statute*, 29 SW. L.J. 884 (1975).

162. Ch. 121, §§ 1-6, [1866] Tex. Laws 120-22, 5 H. GAMMEL, LAWS OF TEXAS 1038-40 (1898), as amended by ch. 44, § 1, [1887] Tex. Laws 30-31, 9 H. GAMMEL, LAWS OF TEXAS 828-29 (1899) (formerly TEX. REV. CIV. STAT. ANN. art. 6840 (1960)); see *Garcia v. Krausse*, 380 F. Supp. 1254, 1259 (S.D. Tex. 1974). See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

163. TEX. REV. CIV. STAT. ANN. art. 6840, § 2 (Supp. 1975-76).

164. *Id.* § 3.

165. TEX. R. CIV. P. 696-716.

A court of civil appeals had concluded during a previous survey period that the Texas statute<sup>166</sup> permitting prejudgment garnishment was unconstitutional as being violative of the due process requirements of the fourteenth amendment.<sup>167</sup> Although arising in the context of a wrongful garnishment action, the same court has concluded that its earlier decision "should not be retroactively applied so as to make a garnishment wrongful that had been obtained in good faith."<sup>168</sup>

#### XIV. MISCELLANEOUS

Article 8.18 of the Texas Business Corporation Act,<sup>169</sup> which pertains to suits by foreign corporations doing business in Texas, provides that "[n]o foreign corporation which is transacting, or has transacted, business in this State without a certificate of authority shall be permitted to maintain any action . . . in any court of this State on any cause of action arising out of the transaction of business in this State, *until* such corporation shall have obtained a certificate of authority." Relying on article 8.18, the defendant in *Troyan v. Snelling & Snelling, Inc.*<sup>170</sup> asserted a plea in abatement to the action contending that it arose out of intrastate business conducted by the plaintiff without the required certificate of authority. Observing that the plea had been filed on the eve of trial, the trial court deferred ruling on the matter until the conclusion of the evidence. After the return of a jury verdict in favor of the plaintiff, the trial court entered an order that the plea was granted to the extent that entry of final judgment was postponed for thirty days. The order also provided that on failure of the plaintiff to file the required certificate within the specified period, the action would be dismissed, but that on filing of such certificate a final judgment granting the relief sought would be entered. The following day the plaintiff filed the required certificate, and the trial court entered a final judgment in favor of the plaintiff. On appeal, noting that "the primary objective of the . . . statute is to encourage such a corporation to obtain authority rather than to penalize it for doing business without authority,"<sup>171</sup> the Dallas court of civil appeals commended the ingenuity of the trial court, observing that its approach "avoided disruption of the docket," "was fair to both parties," and "accomplished the purpose of the statute."<sup>172</sup>

The stage of trial before which the plaintiff may take a nonsuit has been

166. TEX. REV. CIV. STAT. ANN. art. 4084 (1966). See also *id.* art. 4076; TEX. R. CIV. P. 657-79.

167. *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, 504 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ); see *Garcia v. Krausse*, 380 F. Supp. 1254 (S.D. Tex. 1974). See generally *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), noted in 29 Sw. L.J. 660 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

168. *Whittenburg v. Whittington*, 523 S.W.2d 441, 444 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

169. TEX. BUS. CORP. ACT ANN. art. 8.18 (1956) (emphasis added).

170. 524 S.W.2d 432 (Tex. Civ. App.—Dallas 1975, no writ); see *Acme Color Art Printing Co. v. Brown*, 488 S.W.2d 507 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

171. 524 S.W.2d at 434.

172. *Id.* at 435.

the subject of a prolonged controversy. The prior Texas rule, which allowed a nonsuit to be taken "[a]t any time before the jury has retired" or when the case is tried by the judge, "at any time before the decision is announced,"<sup>173</sup> represented the common law view that a plaintiff should be allowed complete control over his case. Although this liberal right to nonsuit was necessary at common law to preserve valid claims which would otherwise have been dismissed for technical pleading errors, the principle was outmoded by modern pleading practices and the elimination of surprise through discovery.<sup>174</sup> Liberal or unlimited nonsuit rules have been criticized<sup>175</sup> for exposing defendants to undue expense and the harassment of preparing for a trial which may not dispose of the case. Such rules may also be misused by plaintiffs to "discover" the opposition's case and gain other tactical advantages not available to defendant. In addition, the waste of court and jury time is a serious concern under liberal nonsuit rules.

Presumably recognizing these criticisms, the supreme court has changed the procedure relating to the taking of a nonsuit. In contrast to the earlier rule, amended rule 164<sup>176</sup> now permits a nonsuit to be taken "at any time before plaintiff has rested his case," that is, "has introduced all of his evidence other than rebuttal evidence."

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173. TEX. R. CIV. P. 164 (1967). This very liberal nonsuit provision was liberally construed by the Texas Supreme Court. In *Smith v. Columbian Carbon Co.*, 145 Tex. 478, 198 S.W.2d 727 (1947), the court permitted a nonsuit where plaintiff moved for nonsuit after the trial judge announced in chambers his decision to grant defendant's motion for instructed verdict and returned to the bench to instruct the jury, but before the instruction and charge were read to the jury.

174. Corresponding to the liberal pleading and discovery rules under federal practice, federal rule 41(a)(1), effective since 1948, limits the plaintiff's right to absolute dismissal to an earlier point than most states. Rule 41(a)(1) permits voluntary dismissal by the plaintiff "(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action." FED. R. CIV. P. 41(a)(1); see Note, *Absolute Dismissal Under Federal Rule 41(a): The Disappearing Right of Voluntary Nonsuit*, 63 YALE L.J. 738 (1954).

175. See, e.g., *Sweeney, Nonsuit in Virginia*, 52 VA. L. REV. 751, 766-68 (1966); Note, *Civil Procedure—Stage of Trial Before Which Voluntary Nonsuit May Be Taken*, 26 TEXAS L. REV. 91 (1947).

176. TEX. R. CIV. P. 164.